J. AVARD MORSE (DEFENDANT).....APPELLANT; 1893

AND *Nov. 29.

INGLIS PHINNEY (PLAINTIFF).....RESPONDENT. 1894

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA. *Feb. 20.

*Chattel mortgage—Affidavit of bonâ fides—Compliance with statutory form—R.S.N.S. 5th ser., c. 92, s. 4.*

By R.S.N.S., 5th ser., c. 92, s. 4, every chattel mortgage must be accompanied by an affidavit of *bona fides*, "as nearly as may be" in the form given in a schedule to the act. The form of the jurat to such affidavit in the schedule is: "Sworn to at in the county of , this day of A.D. . Before me a commissioner," etc.

*Held*, reversing the judgment of the Supreme Court of Nova Scotia, Gwynne J. dissenting, that where the jurat to an affidavit was "sworn to at Middleton this 6th day of July, A.D. 1891, etc., without naming the county, the mortgage was void, notwithstanding the affidavit was headed "in the county of Annapolis." *Archibald* v. *Hubley* (18 Can. S.C.R. 116) followed; *Smith* v. *McLean* (21 Can. S.C.R. 355) distinguished.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of defendant.

The action in this case was against the sheriff of the County of Annapolis, N.S., to try the title to goods claimed by plaintiff under a chattel mortgage from the owner, Lewis Landers, and by defendant under execution issued on a judgment against Landers. The chattel mortgage to plaintiff was attacked on the ground that it did not comply with the provisions of R.S.N.S., 5th ser., ch. 92, sec. 4, which requires every such instrument to be accompanied by an affidavit, as nearly as may be, in the form prescribed by a schedule to the

* PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King, JJ.

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act, of the good faith of the mortgagor in giving it, or else the mortgage shall be void. By the said form the jurat to the required affidavit is to be as follows: "Sworn to at in the county of this day of A.D. , before me a commissioner," etc. The affidavit of Landers accompanying the mortgage to the plaintiff, was headed, "Canada, province of Nova Scotia, County of Annapolis," and the jurat was, "sworn to at Middleton, this 6th day of July," etc., without containing the name of the county in which Middleton is situated. Defendant contended that this departure from the form vitiated the mortgage, while plaintiff urged that section 11 of said chapter 92, providing that slight deviations from prescribed forms, not affecting the substance nor calculated to mislead, shall not vitiate them, operated to cure this defect, and that as the affidavit showed on its face that it was sworn in Annapolis County, in which Middleton is situate, the case is within the decision in *Smith* v. *McLean* (1).

The trial judge held the chattel mortgage void on the authority of *Archibald* v. *Hubley* (2). His judgment was reversed by the full court from whose decision the defendant appealed.

*Borden* Q.C. for the appellant, referred to *Archibald* v. *Hubley* (2); *Parsons* v. *Brand* (3); *Thomas* v. *Kelly* (4); *Ford* v. *Kettle* (5); *Furber* v. *Cobb* (6); *Blankenstein* v. *Robertson* (7).

*Harrington* Q.C. for the respondent, cited *Cheney* v. *Courtois* (8); *Bird* v. *Davie* (9); *Ex parte Johnson* (10); *Emerson* v. *Bannerman* (11).

(1) 21 Can. S.C.R. 355.
(2) 18 Can. S.C.R. 116.
(3) 25 Q.B.D. 110.
(4) 13 App. Cas. 519.
(5) 9 Q.B.D. 139.
(6) 18 Q.B.D. 502.
(7) 24 Q.B.D. 543.
(8) 9 Jur. N.S. 1057.
(9) [1891] 1 Q.B. 29.
(10) 26 Ch. D. 338.
(11) 19 Can. S.C.R. 1.

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FOURNIER J.—I am of opinion that this appeal should be allowed.

TASCHEREAU J.—This is an action against the sheriff of Annapolis County, for the return of goods taken by him under a writ of execution against one Lewis Landers. The goods were in possession of Landers when taken by the sheriff, but are claimed by the plaintiff under a chattel mortgage from Landers to him. The defendant justified under the execution, and also pleaded that the chattel mortgage under which the plaintiff claims is invalid under chapter 92 of the Revised Statutes of Nova Scotia.

The action was tried before Chief Justice McDonald, without a jury. The learned Chief Justice gave judgment for the defendant. The plaintiff appealed from this judgment to the Supreme Court *in banco*. The appeal was heard by Weatherbe, Ritchie, Graham and Meagher JJ. A majority of the learned judges consisting of Weatherbe, Graham and Meagher JJ., were of opinion that the appeal should be allowed, Meagher J. *dubitante*. Ritchie J. was of opinion that the appeal should be dismissed. A rule was granted allowing the appeal. The defendant now appeals.

The Supreme Court of Nova Scotia allowed the appeal on the ground that the chattel mortgage under which the plaintiff claims is a valid instrument as against the defendant under chapter 92, Revised Statutes, Nova Scotia, fifth series.

Upon the true construction of chapter 92, R.S. N.S., fifth series, the chattel mortgage under which the plaintiff claims is, in my opinion, invalid as against the defendant for non-compliance with the statute. Section 2, of chapter 92, is imperative that the affidavit accompanying the chattel mortgage shall be as nearly as may be in the form prescribed by the statute.

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*Archibald* v. *Hubley* (1); *Emerson* v. *Bannerman* (2); *Parsons* v. *Brand* (3); *Thomas* v. *Kelly* (4); *Furber* v. *Cobb* (5); *Re Andrews* (6).

The form of affidavit prescribed by the statute requires the commissioner or person before whom the affidavit is sworn to certify that it was sworn "in the county of " leaving a blank for the county. The person before whom this affidavit was sworn has omitted this statement from his certificate. The jurat to this affidavit does not state, either expressly or by reference, the county in which the oath was administered, and the person administering the oath does not state for what county he is a justice of the peace.

This omission, it seems to me, brings the present case directly within the authority of *Archibald* v. *Hubley* (1) as held by Chief Justice Macdonald at the trial.

In that case the person swearing the affidavit omitted to certify that the affidavit was sworn before him, and in this case the person swearing the affidavit omitted to certify that it was sworn in the county where the oath was administered. If the form requires the one fact to be certified it also requires the other.

The decision in that case of *Archibald* v. *Hubley* (1) is not modified, and never was intended to be, by the decision in *Smith* v. *McLean* (7).

I would allow this appeal and restore the judgment which dismissed the action.

GWYNNE J. The judgment of this court in *Archibald* v. *Hubley* (8), does not hold or purport to hold that section 11 of ch. 1 of the Revised Statutes of Nova Scotia 5th series has no application to a case like the present.

(1) 18 Can. S. C. R. 116.
(2) 19 Can. S. C. R. 1.
(3) 25 Q. B. D. 110.
(4) 13 App. Cas. 519.
(5) 18 Q. B. D. 502.
(6) 2 Ont. App. R. 24.
(7) 21 Can. S. R. 355.

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That section enacts that where forms are prescribed in statutes slight deviations therefrom, not affecting the substance or calculated to mislead shall not vitiate them. By the 4th and 5th sections of ch. 92 of the same series it was enacted that chattel mortgages and bills of sale therein respectively mentioned should be accompanied by an affidavit of the grantor of its *bona fides* to the effect in these sections respectively mentioned, and by section 11 it was enacted that the affidavits mentioned in the said 4th and 5th sections should be as nearly as may be in the form given in schedules A and B respectively. At the foot of the forms in these schedules is given the form of the jurat as follows:—

"Sworn to at in the county of
this day of A.D. 18
"Before me"

Now what the court decided in *Archibald* v. *Hubley* (1) was that the omission of the words "before me" in the jurat to the affidavit of the grantor of the bill of sale in that case wholly vitiated the affidavit; made it in fact no affidavit, although the commissioner who took it testified in court upon oath in an issue as to the title to the property purported to be conveyed by the bill of sale which accompanied the affidavit, that the affidavit was sworn to before him.

The result of that case then simply is that the omission of the words "before me" in the jurat of such an affidavit was not such a slight deviation from the prescribed form not affecting the substance as would come within the protection and saving influence of ch. 1, section 11. That is all that case can be said to have decided. The court did not attempt to lay down and indeed could not lay down any fixed rule applicable to the determination in all cases of the question what deviation would and what would not be within the protection of the section 11 of ch. 1.

(1) 18 Can. S.C.R. 116.

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Then in *Smith* v. *McLean* (1), a question arose upon the same statute ch. 92.

The form prescribed for an affidavit to be made by the grantor of the bill of sale commenced as follows:—"I A. B. of in the county of (occupation) make oath and say as follows, &c." In the affidavit under consideration the "occupation" of the person making the affidavit was omitted wholly; but the court held that that omission did not vitiate the affidavit as his occupation appeared on the face of the bill of sale to which the affidavit referred. That omission was plainly one which constituted such a slight deviation from the prescribed form as brought it within the protection of ch. 1 section 11.

The question in the present case is simply this: Does the deviation from the prescribed form in the present case constitute only such a slight deviation not affecting the substance or calculated to mislead, as to bring it within the protection of the statute—and so not vitiate the instrument; or is it, on the contrary, so substantial a variance or so calculated to mislead as not to come within the protection of the statute and to be fatal to the validity of the instrument? The variance is this. The affidavit is headed as made in

"Canada—Province of Nova Scotia,

"County of Annapolis."

The jurat was—"Sworn to at Middleton this 6th "day of July, A.D. 1891

"Before me

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leaving out the name of the county in which Middleton is. But that the affidavit was sworn in the county of Annapolis appears from the heading to the affidavit, and that Middleton is situated in the county of Annapolis is not disputed.

(1) 21 Can. S.C.R. 355.

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Now without impugning in the slightest degree the judgment of this court in *Archibald* v. *Hubley* (1) I must say that this omission does appear to me to constitute just such a slight deviation from the prescribed form, not affecting the substance or calculated to mislead, as to come within the protection of ch. 1 section 11, and that we must therefore hold that the omission does not vitiate. It certainly appears to me to be as harmless a deviation from the prescribed form as was that in *Smith* v. *McLean* (2).

All cases of this description must be brought to the test of the statute ch. 1 section 11.

I am of opinion therefore that this appeal must be dismissed with costs.

SEDGEWICK J.—I concur in the judgment prepared by Mr. Justice King.

KING J.—The question raised by this appeal is as to the validity of a chattel mortgage given by one Landers to the respondent, the plaintiff below. Upon the trial the learned Chief Justice of Nova Scotia held that the instrument was invalid for want of compliance with the statute, ch. 92, Revised Statutes of Nova Scotia. The Supreme Court of Nova Scotia, per Weatherbe, Graham and Meagher JJ., (Ritchie J. dissenting) reversed the judgment and this appeal is from that decision.

The statute referred to requires that

Every bill of sale of personal chattels made either absolutely or conditionally, subject or not subject to any trust, shall be filed with the registrar.

It also provides (sec. 4) that:

Every bill of sale or chattel mortgage of personal property other than mortgages to secure future advances shall hereafter be accompanied by an affidavit of the party giving the same or his agent or attorney duly authorised in that behalf, that the amount set forth therein as being the consideration thereof is justly and honestly due and owing by the

(1) 18 Can. S. C. R. 116. (2) 21 Can. S.C.R. 355.

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grantor * * * ; otherwise such bill of sale or chattel mortgage shall be null and void as against the creditors of the grantor or mortgagor.

By sec. 11 it is provided that the affidavits mentioned in secs. 4 and 5 shall be as nearly as may be in the form in schedules A and B, respectively, and the following is the form of jurat in said schedules :—

"Sworn to at , in the county of , this day of , A. D., 18 , before me.

(Signed), A. B."

In the jurat to the affidavit accompanying and filed with this chattel mortgage there was no reference to the county. The jurat was as follows: "Sworn to at Middleton, this 6th day of July, A.D., 1891, before me, (Signed), A. W. P., J. P."

In *Archibald* v. *Hubley*, (1) (a case under the same statute), it was held that the omission of the day of the month and the words "before me" from the jurat rendered the bill of sale void. This was a decision of the late Chief Justice, and of Justices Fournier and Patterson, Justices Taschereau and Gwynne dissenting. At page 112 the late Chief Justice says :—

If these can be omitted why may not the place where sworn be likewise dispensed with and so the whole jurat be got rid of ?

Patterson J., (p. 135) says :—

By sec. 4 the mortgage or bill of sale is to be null and void as against creditors unless the prescribed affidavit of bona fides is made, and sec. 11 is imperative that it shall be as nearly as may be in the given form. This is undistinguisable from the English Act of 1882 which provides in sec. 9 that the bill of sale shall be void if not made in accordance with the form in the schedule to the act * * * Some of the decisions in Ontario which have been cited have gone as far as liberal construction of the facts would allow to uphold defective affidavits in cases of this kind, but no case has gone the length we are asked to go in this case and besides they have no provision in Ontario like that of the 11th sec. of the Nova Scotia Act."

If it were not for this decision, it might perhaps be open to point out a possible distinction between the

(1) 18 Can. S.C.R. 116.

English and the Nova Scotia act, in this, that, by the former, the formal characteristics, are expressly made matters of substance by the direct provision avoiding the bill of sale if not made in accordance with the form, while in the case of the act in question the penalty is laid for non-compliance with a provision requiring an affidavit setting forth certain matters of substance; and then by a further provision (sec. 11) it is enacted that such affidavit shall be as nearly as may be in the forms in the schedules, which forms deal with both formal and substantial requirements.

But as already observed the decision in *Archibald* v. *Hubley*(1) makes no account of this verbal difference and treats the enactment in question as though it in terms enacted that the bill of sale, &c.. should be void if not made as nearly as may be in the form given in the schedule. In this state of things the form given in the schedule cannot be treated merely as a model (as is ordinarily the case when forms are prescribed) for the form becomes a matter of substance; the essence of the thing is in the form, and the provision is unaffected by the general statutory provision that "forms when prescribed shall admit variations not affecting the substance or calculated to mislead." It has not been held under the English Statute that slavish or literal adherence to the form is required, but it has been held that in a case where form is prescribed and departure from it penalized, divergence from the form in what is characteristic of it is fatal.

In *Ex parte Stamford*, (2) Bowen C. J., delivering the judgment of five judges of the Court of Appeal, says:—

> But a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect either greater or smaller than that which would attach to it if drawn in the form which has been sanctioned.

(1) 18 Can. S.C.R. 116.

(2) 17 Q. B. D. 259, 270.

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And he adds :—

We must consider whether the instrument as drawn will in virtue either of addition or omission, have any legal effect which either goes beyond or falls short of that which would result from the statutory form.

In *Thomas* v. *Kelly*, (1) Lord Fitzgerald says :—

I would hesitate, my lords, to criticise a proposition coming from a tribunal so important and so weightily constituted (Lord Esher M. R., and Cotton, Lindley, Bowen and Lopes JJ., FryL. J. diss). I am not now called on to do so, nor shall I say more than that I am not now to be taken as adopting in all its terms that rule of construction, as affording an inclusive as well as exclusive test.

Lord Macnaghten (p. 519) says that :—

The section seems to me to deal with form and form only. So purely is it, I venture to think, a question of form, that I should be inclined to doubt whether a bill of sale would not be void which omitted the proviso referring to section 7, though I cannot see that the omission would alter the legal effect of the document in the slightest degree, or mislead anybody. It has been held, and I think rightly, that section 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the act are "in accordance with the form," not "in the form." But then comes the question : When is an instrument which purports to be a bill of sale not in accordance with the statutory form? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly I should say, when it departs from the statutory from in anything which is a characteristic of that form.

In his dissenting judgment in *Ex parte Stamford* (2), Fry J. says :—

The act of 1882 is a remarkable statute, imposing stringent fetters on the power of contracting in respect of loans on chattels * * * It is a statute which deals in an imperious manner, not with the substance only, but with the form of the instrument * * Again, the particular section now in question (the 9th) is an enactment of a remarkable, and so far as I know of late years, novel description, for it is aimed, not at the operation or substance of an instrument, but at its form, and in its demand for accordance with the scheduled form, it has no words of indulgence, such as, "or to the like purport or effect,' and in default of such accordance it makes the instrument void not as against third persons only, but as against the maker himself.

(1) 13 App. Cas. 517. (2) 17 Q.B.D. 274.

*Parsons* v. *Brand* (1), was a case where a bill of sale was held void because both the address and description of the attesting witness did not appear in the attestation clause in accordance with the direction to that effect contained in the form. The omission was not held to be one which altered the legal effect of the instrument, but *Thomas* v. *Kelly* (2), was considered as clearly holding that divergence from the form was not necessarily immaterial because it did not alter the effect of the instrument. Lord Justice Cotton also says that the word "form" does not refer only to what expresses the contract between the parties. He also pointed out that the test laid down in *Ex parte Stamford* (3), was one applicable only where the alleged divergence relates to the effect of the contract, and says that that case "must not be taken as intended to lay down a rule that nothing is a material departure from the form unless it alters the effect of the instrument."

Lindley L.J. (a party also to *Ex parte Stamford* (3), says:—

> It is a hard thing to be obliged to upset a fair transaction because t's are not crossed and i's not dotted, but we must give effect to the act, and I cannot see that a document is in accordance with the form unless all particulars are filled up which the form requires to be filled up.

In *Bird* v. *Davey* (4) the bill of sale had two attestation clauses attesting the execution of the instrument by two different grantors respectively. The signature to both attestation clauses was the same, and in one of them the address and description of the attesting witness was given, but in the other they were not. It was held that the form was complied with because, from what appeared on the face of the bill itself, an irresistible inference, in the opinion of the court, arose that the witness in the two attestation clauses was the same person. Pollock B. and Day J. had decided adversely

(1) 25 Q.B.D. 110.
(2) 13 App. Cas. 506.
(3) 17 Q.B.D. 259.
(4) [1891] 1 Q.B. 29.

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to the bill of sale on the authority of *Parsons* v. *Brand* (1), but the Court of Appeal (Lord Esher, Lindley and Lopes L. JJ.) reversed the decision. The effect of the act is that the name, address and description of the attesting witness must appear on the face of the bill of sale.

Lord Esher says (2):

If any extraneous evidence were necessary to show that the two signatures were those of the same man I should say that such evidence could not be given, and that the requirements of the act had not been satisfied. But if on looking at what appears on the face of the bill of sale, the inference is irresistible, so that the court can have no doubt that it was the same man who signed both attestation clauses, then the result is that the address and description of the attesting witness to the second attestation clause are given on the face of the bill of sale. To say that the address and description must be given in any particular order, as suggested by the counsel for the execution creditor, would, I think, be construing the act too strictly. In this case each member of the court, on looking at the bill of sale, has not the smallest doubt that the evidence is irresistible that the two attestation clauses are signed by the same person. Under these circumstances the case is distinguishable from *Parsons* v. *Brand* (1).

Lindley L.J. says:—

The form in the schedule says: "Add witness's name, address and description." Therefore the name, address and description must appear on the face of the instrument, and in the attestation clause somewhere; but the act does not say that where the same witness is attesting several signatures, he must set out his address and description as often as he attests. I cannot bring myself to think that the act requires such strictness as that. If it plainly appears on the face of the instrument that it is the same witness that is attesting in each case, and his address and description be given once, it appears to me to be sufficient.

Lopes J. says:—

If from what appears on the face of the bill of sale, without any external evidence an irresistible interference arises, there is nothing to prevent us from drawing that inference.

This latter case appears to introduce a new element, the right of the court in such cases to draw inferences

(1) 25 Q.B.D. 110. (2) P. 32.

of fact from the physical appearance of the instrument, inferences of fact based on their knowledge of handwriting, as distinguished from conclusions as to the construction of the written matter. Still it lays down that there must be an irresistible inference to the same effect as the form requires.

Then there is the case of *Smith* v. *McLean* (1), a case under the statute now in question. The form requires that in the affidavit the occupation of the deponent shall be stated. The affidavit referred to the deponent as "the within named grantor," and in the body of the bill of sale the occupation of the grantor was given. It was held, following *Bird* v. *Davey* (2) that it was sufficient if the required fact appeared upon the face of the instrument, and that it did so appear by virtue of the words of reference contained in the affidavit and the fact referred to in the body of the bill of sale. It was, as the learned counsel for the appellant contends, a case of the deponent making a reference, and not of the court making an inference.

Patterson J says (3) :—

> But whatever the deed shows respecting the grantor the affidavit also shows respecting the deponent, who swears that he is the same person as the grantor ; by this reference to the deed the occupation is shown and the statute satisfied.

It was said that there should be a presumption of regularity, but in *Ford* v. *Kettle* (4), Jessel M.R. says that where there is no act of Parliament things may be presumed to have been done which are not to be presumed where an act requires it to be stated.

It appears to me that, in principle, *Archibald* v. *Hubley* (5) is not to be distinguished from the case before us. It is a substantial thing that the affidavit should be sworn before the justice or commissioner. *Archibald* v. *Hubley* (5) holds that it is a substantial part of the

(1) 21 Can. S.C.R. 355.
(2) [1891] 1 Q. B. 29.
(3) P. 358.
(4) 9 Q. B. D. 139.
(5) 18 Can S.C.R. 116.

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form that this matter of substance should be stated. It is no less a substantial thing that the affidavit should be taken in the county where the justice or commissioner has jurisdiction to administer it. It must be equally, as in the other case, a substantial matter of form that this matter of substance should be stated.

If the jurat had any words of reference by which the place of swearing could be made to appear anywhere on the face of the instrument *e.g.* if it ran thus: "Sworn to at Middleton aforesaid," then as the deed made reference to but one Middleton and to it as being in the county of Annapolis, the case would be within *Smith* v. *McLean* (1). *Id certum est quod certum reddi potest.* The naming of the county at the head of the affidavit does not advance the matter at all. What is required is that the place of swearing shall be rendered reasonably certain as to the county by the jurat, and be so certified to in terms by the official administering the oath, as is done by a jurat following the form. It is a not unimportant matter as tending to the authentication of the swearing that the jurat should state the place where sworn.

*Grant* v. *Fry* (2), cited by the learned judge, is not to the contrary of this. The jurat there stated the affidavit to have been sworn in Cheltenham aforesaid, and the deponent was in the body of the affidavit described as of Cheltenham in the county of Gloucester.

The affidavit failing to satisfy the requirement of the act in substantial matters of form, the bill of sale is avoided. The result is that the appeal should be allowed.

*Appeal allowed with costs.*

Solicitors for the appellant: *Cummings & Lovitt.*

Solicitor for the respondent: *J. G. H. Parker.*

(1) 21 Can. S.C.R. 355.

(2) 8 Dowl. 234.